Filed 3/19/09 P. v. Neal CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARCEL ANTHONY NEAL, Defendant and Appellant.	B200943 (Los Angeles County Super. Ct. No. NA073597)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur H. Jean, Judge. Affirmed.

Michael J. Shultz, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Marcel Anthony Neal was convicted of two counts of second degree robbery, with enhancements for personal use of a firearm. (Pen. Code, §§ 211, 12022.53, subd. (b).)[1] The evidence showed that appellant and an accomplice both held guns while they robbed two men who were sitting inside a parked truck in Signal Hill. On count 1, appellant was sentenced to the upper term of five years in prison, plus 10 years for the enhancement. On count 2, he received a consecutive sentence of one year in prison, with the enhancement stayed.

Appellant contends: (1) The trial court should have excluded evidence that appellant and the accomplice committed an uncharged robbery in Rancho Cucamonga about six hours before the charged Signal Hill robberies. (2) The court should not have imposed the section 12022.53, subdivision (b) enhancement on count 1, because as appellant reads the information, that enhancement was alleged for count 2 but not for count 1. (3) The trial court should not have refused to appoint an expert on eyewitness identification. (4) The trial court erred in imposing an upper term sentence.

We reject appellant's contentions and affirm.

FACTS

1. Prosecution Evidence

Around 6:20 a.m. on November 9, 2005, two construction workers, Jeffrey C. and Brett C., sat inside Jeffrey's parked truck and talked, as they waited for their job site in Signal Hill to open.[2] It was already daylight. Jeffrey was in the driver's seat. Brett was in the front passenger's seat. The doors on both sides of the truck were open.

Looking in his mirror, Jeffrey noticed that a green Ford Explorer was approaching from behind. He turned toward Brett and resumed their conversation. Suddenly, a gun was pushed in his face. The gunman demanded money. Jeffrey took out his wallet and

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[1] All code references are to the Penal Code unless otherwise stated.

[2] We refer to the victims by their first names to protect them, intending no disrespect. The first name of the victim in count 1 is shown as "Jeff" on the information. We use the more formal name Jeffrey, as that is the name he gave before he testified.

handed over $30. A second gunman stood on Brett's side of the car. He held a gun at Brett's face and also demanded money. Brett gave the second gunman $195. The gunmen returned to the Ford Explorer and it drove away. As it left, Jeffrey wrote down six digits of its license plate. He gave that information to the police when they arrived. He and Brett also provided descriptions of the two gunmen, including the fact that both were young African-Americans.

Police investigation showed that a green Ford Explorer registered to Christopher Nelson had a license plate that matched the information Jeffrey wrote down. Investigators also learned that on October 1, 2005, about a month before the Signal Hill incident, appellant received a moving citation for driving that vehicle at night with the headlights off. Photo lineups (six-packs) containing appellant's and Nelson's photos were shown to Jeffrey and Brett. They both identified Nelson as the gunman on Jeffrey's side and appellant as the gunman on Brett's side. They repeated their identifications of appellant at his trial. The traffic citation that appellant received was found inside Nelson's Ford Explorer when the police located that vehicle.

There also was evidence of the robbery incident in Rancho Cucamonga. On the evening of November 8, 2005, Mary A. and Jennifer R. worked as bartenders at a restaurant in that city. After work, around 12:30 a.m., they talked together in the restaurant's parking lot while standing next to their adjacent vehicles. A green Ford Explorer stopped near them. Four young male African-Americans were inside it. Two of them left the Ford Explorer, both holding guns. They each approached one of the women and demanded money while pointing the guns. The women handed over their money. The gunmen returned to the Ford Explorer and drove off in it. As it left, Mary wrote down the first three numbers of its license plate. That information matched Nelson's Ford Explorer. Mary recognized that vehicle when she was shown a photo of it. Mary and Jennifer both picked out appellant's photo from a six-pack. At the trial, Mary testified that appellant was one of the two robbers, but she did not know if he was the gunman who approached her or the gunman who approached Jennifer. When Jennifer

testified, she had no independent recollection of whether appellant was one of the robbers.

2. Defense Evidence

Christopher Nelson testified that he participated in, and had already pled guilty to, the robbery incidents in Signal Hill and Rancho Cucamonga. His green Ford Explorer was used during the crimes. He was the robber on the driver's side during the Signal Hill incident. Appellant was his cousin, but appellant was not with him that night. He committed the robberies in Signal Hill and Rancho Cucamonga with appellant's brother.

Appellant's brother did not testify, as he claimed his United States Constitution Fifth Amendment privilege after counsel was appointed for him.

Appellant testified that he was not present when the crimes occurred. He said he had not seen Nelson since October 1, 2005, when he got a traffic ticket while driving Nelson's Ford Explorer in north Long Beach.

3. Prosecution Rebuttal Evidence

Recalled as a witness, Brett looked at appellant's brother in the courtroom. Brett said he did not recognize the brother, who was not "in any way the person who robbed [him]." When asked how he could be so sure, Brett answered: "He [the brother] is not the person that robbed me. His face is a little bit too fat. It is not him."

DISCUSSION

1. The Uncharged Robbery

Prior to the trial of the Signal Hill robberies, the prosecutor sought to present evidence of the Rancho Cucamonga robberies due to the common features between them. Defense counsel objected that the evidence was not relevant or, alternatively, should be excluded pursuant to Evidence Code section 352. The trial court overruled the objection, stating: "It seems to me that it is very relevant, far more probative than prejudicial. There appears to be a like robbery, not too distant in time or space. There appears to be the same vehicle that was used. There seems to be the same identification that was made. This seems to me to be -- this is an identification case. It seems to me to go right to identification."

Appellant contends that the trial court should have excluded the evidence of the Rancho Cucamonga incident, as it was not sufficiently similar to the Signal Hill incident to be admissible under Evidence Code section 1101, subdivision (b) and *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), and, alternatively, its probative value was outweighed by the risk of prejudice.

Other crimes' evidence is admissible if it is relevant to an issue other than criminal disposition, such as identity. (Evid. Code, § 1101, subd. (b); *Ewoldt, supra,* 7 Cal.4th at p. 393; *People v. Balcom* (1994) 7 Cal.4th 414, 422.) Even if relevant, evidence of uncharged misconduct is excluded if its probative value is outweighed by the risk of prejudice. (*Ewoldt,* at p. 404; see also *Balcom,* at p. 422.) To be admissible on the issue of identity, "the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*Ewoldt,* at p. 403; see also *People v. Gray* (2005) 37 Cal.4th 168, 203.)

We find sufficient distinctive common features here between the two incidents, including that (a) they occurred within hours of each other; (b) the same two participants, appellant and Nelson, were identified by the victims of both incidents; (c) the same vehicle, Nelson's Ford Explorer, was used; and (d) on both occasions, appellant and Nelson each approached one of the two victims to simultaneously rob them at gunpoint. We also find nothing unduly prejudicial about the facts of the Rancho Cucamonga incident, so its exclusion was not required under Evidence Code section 352. We therefore find no error regarding evidence of the uncharged robberies.

2. The Enhancement on Count 1

Appellant contends that the trial court committed reversible error and violated his constitutional right to due process of law by allowing a true finding on a firearm use allegation that was never pled in the information. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)

Subdivision (b) of section 12022.53 (section 12022.53(b)) adds a 10-year enhancement for personal use of a firearm. Pursuant to subdivision (j) of section

12022.53, for the penalties of section 12022.53 to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact. Similarly, section 1170.1, subdivision (e) states: "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

The jury's verdict included true findings under section 12022.53(b) for counts 1 and 2, which alleged, respectively, the robberies of Jeffrey and Brett. The trial court imposed the enhancement on count 1 but stayed it on count 2. Appellant maintains that the information contained a section 12022.53(b) allegation for count 2 but not for count 1.

We copy the language and format of the information below.[3] The section 12022.53(b) allegation appears after count 2, without language to specify whether it

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[3]

"COUNT 1

"On or about November 9, 2005, in the County of Los Angeles, the crime of SECOND DEGREE ROBBERY, in violation of PENAL CODE SECTION 211, a Felony, was committed by MARCEL ANTHONY NEAL, who did unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of JEFF [C].

"'NOTICE: The above offense is a violent felony within the meaning of Penal Code 667.5(c).'

"'NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c).'

"* * * * *

"COUNT 2

"On or about November 9, 2005, in the County of Los Angeles, the crime of SECOND DEGREE ROBBERY, in violation of PENAL CODE SECTION 211, a Felony, was committed by MARCEL ANTHONY NEAL, who did unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of BRETT [C].

applied to one or both of the counts. On the other hand, because the two counts are separated by asterisks, and the section 12022.53(b) allegation is placed just before the asterisks that follow count 2, it is possible to read the information to mean that the allegation applied only to count 2. Also, the "INFORMATION SUMMARY" section of the information, which appears before the actual charges, indicates that the section 12022.53(b) allegation applies only to count 2.

Assuming the information is ambiguous regarding whether the section 12022.53(b) allegation applies to both counts, appellant has not preserved this issue for the appeal. He had notice, from the evidence at the preliminary hearing, that the People would show that he and his confederate both held guns when they simultaneously robbed the two victims in Signal Hill. At the trial, everyone proceeded as if the section 12022.53 allegation applied to both of the counts.[4] Most importantly, there was no objection to language in the jury instructions and verdict forms that indicated a separate finding on section 12022.53(b) was necessary on both of the counts. We are therefore satisfied that appellant's failure to raise an issue below regarding the pleading of the section 12022.53(b) means that he impliedly consented to, and waived any objection to, any deficiency in the pleading of that enhancement. (*People v. Toro* (1989) 47 Cal.3d 966,

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"'NOTICE: The above offense is a violent felony within the meaning of Penal Code 667.5(c).'

"'NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c).'

"It is further alleged that said defendant(s), MARCEL ANTHONY NEAL[,] personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b).

"* * * * *"

[4] The one exception was that, when the trial court informed the jury of the charges at the start of the trial, it mentioned an allegation of firearms use only in connection with count 2.

975-977, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Seaton* (2001) 26 Cal.4th 598, 641.)

Assuming arguendo that the issue was not waived, it lacks merit. Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. (*People v. Toro*, *supra*, 47 Cal.3d at p. 973.) The preliminary hearing evidence showed that appellant used a gun when both victims were robbed. There is no possibility he was taken by surprise by the identical facts at the trial.

People v. Riva (2003) 112 Cal.App.4th 981, 985, 1000 (*Riva*), is directly on point. As to all three charged counts, the jury made a finding that the defendant personally used a firearm, within the meaning of section 12022.53, subdivision (d) (section 12022.53(d)). The information contained a section 12022.53(d) allegation for only two of the counts. The trial court imposed sentence, including a section 12022.53(d) enhancement, on the count that lacked a section 12022.53(d) allegation, while staying the other two counts. *Riva* held that, although the issue was "close," imposition of the section 12022.53(d) enhancement did not violate the statutory scheme or the defendant's right to due process of law. (*Riva*, at p. 1002.) "[T]he prosecution complied with the literal requirements of sections 12022.53, subdivision (j) and 11701, subdivision (e) by pleading the enhancement in other counts in the information." (*Ibid.*) *People v. Mancebo* (2002) 27 Cal.4th 735 is distinguishable, as it involved an unpled circumstance that was used for the purpose of the "One Strike" law, whereas the enhancement in *Riva* had been pled, but just not on the count for which it was imposed. (*Riva*, at p. 1002.)[5] Failure to plead the enhancement on that count did not interfere with the defendant's ability to contest the factual base of the enhancement, as he had notice from the other counts that he had to

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5 Appellant's briefing relies heavily on *People v. Mancebo*, *supra*, 27 Cal.4th 735 and *People v. Lohbauer* (1981) 29 Cal.3d 364, 368. Both are distinguishable due to the presence of the section 12022.53(b) allegation in the information in this case.

defend against a section 12022.53(d) enhancement. (*Riva*, at p. 1003.) The same was true here.

3. Refusal to Appoint an Expert Witness on Identification

On May 14, 2007, appellant filed a motion for appointment of Dr. Robert Shomer, an expert on eyewitness identification. The trial court denied the motion on the ground that appellant was connected to the getaway car by personal property found in the car. It later observed that it had heard testimony from experts on that subject, and thought the studies they utilized were "very insubstantial." In any event, it denied the motion because "there [was] corroboration in this case that makes an identification expert superfluous."

Appellant maintains that denial of funds for the expert violated "the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment right to counsel, and the Fifth, Sixth and Fourteenth Amendment rights to present a defense."

Appointment of an expert on the subject of eyewitness identification is authorized by *People v. McDonald* (1984) 37 Cal.3d 351, 361-377. *McDonald* also recognized that it is not error to exclude such testimony if the eyewitness's identification is "substantially corroborated by evidence giving it independent reliability . . . ." (*Id.* at p. 377.) There was such corroboration here, as Jeffrey wrote down part of the green Ford Explorer's license plate number, and appellant was linked to that vehicle through the traffic citation he received while driving it. The trial court therefore did not abuse its discretion when it denied appellant's motion.

Assuming arguendo that the denial of the eyewitness expert was error, the overwhelming nature of the evidence means there was no prejudice, whether we apply the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, as the court did in *People v. McDonald*, *supra*, 37 Cal.3d at page 376, or use the standard for federal constitutional error of *Chapman v. California* (1967) 386 U.S. 18.

Jeffrey and Brett were both sure that appellant was the robber on Brett's side of the truck during the Signal Hill incident. Looking at six-packs, the two victims of the uncharged Rancho Cucamonga incident also identified appellant as one of the

perpetrators of the robberies there, about six hours earlier. Nelson, who was appellant's cousin, confessed that he was the robber on the driver's side during the Signal Hill incident. Nelson said he committed the crimes with appellant's brother, but Brett was positive that he was robbed by appellant and not by his brother. Nelson's green Ford Explorer was used for both of the incidents, according to partial license plate numbers that two of the victims immediately wrote down. That information matched Nelson's green Ford Explorer, to which appellant was linked by the traffic ticket. Given the strength of the evidence, we conclude that the court's refusal to appoint the expert was harmless error, assuming it was error at all.

In the reply brief, appellant adds that reversal is required by the cumulative effect of the erroneous rulings on the Rancho Cucamonga incident and the expert on eyewitness identification. Having rejected both contentions, we find no merit in the claim of cumulative error.

4. The Sentencing Issues

Appellant was convicted of committing the charged robberies in Signal Hill on November 9, 2005. According to the probation report, he was born in August 1986, which means he was 19 years old at that time.

The "prior record" section of the probation report has two entries: (1) In January 2004, when appellant was 17 years old, he was arrested for second degree robbery. That arrest led to a sustained petition in juvenile court and a commitment to the camp community placement program. (2) On an unknown date, appellant was arrested for robbery, which led to a bench warrant on April 12, 2006, in case No. FWV037422. That arrest apparently refers to the Rancho Cucamonga incident, as the report later mentions that appellant had an active warrant in San Bernardino County for robbery.

On July 25, 2007, the jury found appellant guilty, and he was immediately sentenced. Six days earlier, the California Supreme Court decided *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). The trial court imposed a total prison sentence of 16 years, based on the upper term of five years for the second degree robbery in count 1, plus 10 years for the firearms enhancement on count 1, plus one year for the second

degree robbery in count 2. It gave this explanation for its selection of the upper term: "And the reason for that is because of the juvenile prior in 2004. He went to camp on that case. He knows better. He has been through the system."

Appellant contends that his case must be remanded for resentencing because (a) it is unconstitutional to retroactively apply newly amended section 1170 to remedy sentencing errors under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), and (b) a sustained juvenile court petition cannot be used as the reason for imposing the upper term.

A. The Ex Post Facto Issue

In November 2005, when the Signal Hill robberies occurred, former section 1170, subdivision (b) (former section 1170(b)) provided that in imposing sentence, if there were three possible terms for the offense, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

On January 22, 2007, the United States Supreme Court decided *Cunningham*, *supra*, 549 U.S. 270. Abrogating *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), *Cunningham* held that under former section 1170(b), it is the middle term of a sentence under the determinate sentencing law (DSL), and not the upper term, that constitutes the statutory maximum sentence. (*Cunningham*, at pp. 293-294.) The Supreme Court further held that the DSL violates a defendant's Sixth and Fourteenth Amendment rights to jury because it gives the trial judge, and not the jury, the authority to find the facts that permit an upper term sentence. (*Cunningham*, at pp. 293-294.) Those holdings relied on *Blakely*, *supra*, 542 U.S. 296, which relied in turn on this language from *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*): "'*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, at p. 301, quoting *Apprendi*, at p. 490, italics added.)

In March 2007, the California Legislature passed Senate Bill No. 40 (2007-2008 Reg. Sess.) as urgency legislation, to bring the DSL into compliance with *Cunningham*. (Stats. 2007, ch. 3, § 2, pp. 4-6.) Senate Bill No. 40 amended former section 1170(b). As

amended, the section provides that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170(b).)

Senate Bill No. 40 made three basic changes to the procedure for imposing a determinate term of imprisonment: (1) The middle term is no longer the presumptive term in the absence of aggravating or mitigating circumstances; (2) the trial court has broad discretion to impose the lower, middle or upper term, based upon the interests of justice; and (3) the trial court must set forth reasons for its chosen sentence, but it is not required to make findings of fact. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992; see also *Sandoval, supra*, 41 Cal.4th at pp. 843-845; Cal. Rules of Court, rules 4.406, 4.420, 4.421 & 4.423.)

In response to Senate Bill No. 40, the Judicial Council made new sentencing rules for the new version of the DSL. (See Cal. Rules of Court, rules 4.405-4.452.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), the California Supreme Court explained the effect of *Cunningham* on the DSL. Under *Black II*, "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, at p. 816.) *Black II* further ruled that the "fact of a prior conviction" exception to the right to jury extends beyond the fact of the prior conviction, and includes "other related issues that may be determined by examining the records of the prior convictions." (*Id.* at p. 819; see also *People v. Towne* (2008) 44 Cal.4th 63, 70 ["[T]he aggravating circumstance that a defendant served a prior prison term or was on probation or parole at the time the crime was committed may be determined by a judge and need not be decided by a jury"].)

In *Sandoval, supra*, 41 Cal.4th 825, the California Supreme Court reversed an upper term sentence due to *Blakely/Cunningham* error, and then adopted procedures for

cases that are remanded for resentencing on that basis. The court utilized its authority to fashion a constitutional procedure for those hearings and concluded that it was appropriate to adopt the procedures set forth in Senate Bill No. 40. (*Sandoval*, at pp. 843-852.) It then rejected an ex post facto argument like the one appellant makes here, for defendants whose crimes were committed before *Sandoval* was decided. (*Id.* at pp. 853-857.)

We are, of course, required to follow *Sandoval*'s holding on the ex post facto issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, both before and after Senate Bill No. 40, the "fact of a prior conviction" exception permitted use of a prior conviction to increase a defendant's sentence, with no requirement of a jury determination on that issue. The upper term sentence here therefore did not involve retroactive application of Senate Bill No. 40.

B. Use of a Sustained Juvenile Petition as the Reason for the Upper Term

Appellant contends that his prior juvenile adjudication for robbery does not qualify as a "prior conviction" for the purpose of the "fact of a prior conviction" exception of *Apprendi*, *supra*, 530 U.S. at page 490. He stresses that juvenile court proceedings are not the equivalent of adult criminal proceedings, as they lack jury trials. Indeed, the Ninth Circuit does not permit a nonjury juvenile adjudication to be used to increase the sentence beyond the prescribed statutory maximum due to that lack of a jury at juvenile proceedings. (*United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1192-1194.) In general, however, California courts have long permitted consideration of the defendant's juvenile record as a circumstance in aggravation. (*People v. Berry* (1981) 117 Cal.App.3d 184, 191-193; *People v. Hubbell* (1980) 108 Cal.App.3d 253, 256; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 268, p. 354.)[6]

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[6] Numerous cases have also authorized use of a sustained juvenile court petition as a "strike" conviction for the purpose of the "Three Strikes" law. (*People v. Fowler* (1999) 72 Cal.App.4th 581; *People v. Bowden* (2002) 102 Cal.App.4th 387; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075; but see *id.* at p. 1082 (conc. & dis. of Johnson, J.).) That issue is currently pending before the California Supreme Court. (*People v. Nguyen*,

Respondent maintains that after Senate Bill No. 40 and *Sandoval*, the trial court can consider any facts when it exercises its discretion regarding the three possible terms. That argument overlooks the fact that there are limitations on what the trial court can properly consider, as it must state reasons for its decision, and the reviewing court has the power to find an abuse of discretion if those reasons are inappropriate. (*Sandoval*, *supra*, 41 Cal.4th at p. 847.) To find an abuse of discretion here, however, we would have to find that the trial court could not appropriately use appellant's juvenile record as a circumstance in aggravation. We choose to follow previous cases that have permitted use of that circumstance, and therefore find no error in appellant's sentence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, Acting P. J.

We concur:

BIGELOW, J.

O'NEILL, J.*

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review granted Oct. 10, 2007, S154847; *People v. Tu*, review granted Dec. 12, 2007, S156995.)

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.